IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Steve Weinberg,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No. 3-06-CV2332-B**
	§	**ECF**
National Football League Players	§	
Association, Roger Kaplan,	§	
Gene Upshaw, Tom DePaso,	§	
Richard Berthelson, Keith Washington,	§	
Mark Levin, and Trace Armstrong	§	
	§	
Defendants.	§	

PLAINTIFF'S MOTION TO REMAND AND BRIEF IN SUPPORT THEREOF

Dockets.Justia.

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TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff Steve Weinberg, by and through counsel to file this Motion to Remand and in support thereof would respectfully show the Court, as follows:

I.

PRELIMINARY STATEMENT

For twenty-two (22) years, Plaintiff Steve Weinberg ("Weinberg" or "Plaintiff") represented players as a Certified Contract Advisor ("Contract Advisor") of the National Football League Players Association (the "NFLPA"). Weinberg filed a lawsuit in state court in Dallas County, Texas alleging fraud, tortious interference with existing contracts, tortious interference with prospective business relations, conspiracy, and illegal restraint of trade for Defendants' lies and deceit that not only interfered with Weinberg's existing contracts and prospective business relations but also robbed him of his life's work and passion.

Without federal question jurisdiction or complete diversity, removal of this action by the NFLPA Defendants was improper.[1] Accordingly, the Court should remand this action and award Plaintiff his fees and costs incurred as a result of the improper removal.

II.

PROCEDURAL HISTORY

1. Weinberg commenced this action in the 95th Judicial District Court of Dallas County, Texas ("State Court") on November 17, 2006.[2]

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[1] All of the Defendants consented to the removal of this action; thus, all of the Defendants are collectively referred to as the "NFLPA Defendants."

[2] *See* Plaintiff's First Amended Petition ("Petition") (doc. 1-5), which is incorporated herein by reference.

2. On December 18, 2006, the NFLPA Defendants filed their Notice of Removal to the Northern District of Texas, Dallas Division,[3] arguing that Weinberg's state claims are completely pre-empted under Section 301 of the Labor-Management Relations Act ("LMRA") and Section 9 of the National Labor Relations Act ("NRLA") and that diversity jurisdiction exists under a theory of improper joinder.

3. The Court granted Plaintiff's Expedited Agreed Motion to Extend Deadline to File his Motion to Remand and Response to Defendant's Motion to Dismiss or Compel Arbitration on or before January 31, 2007.[4]

4. On January 31, 2007, Plaintiff filed his Motion to Remand.

III.

SUMMARY OF ARGUMENT

To begin, the NFLPA has not met its burden to establish a federal question because their notice of removal improperly attempts to bootstrap tangential references to the National Football League Collective Bargaining Agreement ("CBA") and the NFLPA Regulations Governing Contract Advisors (the "Regulations") in Weinberg's First Amended Petition to extinguish the NFLPA's legal obligation or duty not to defraud a member of the general public; not to tortiously interference with existing contracts or prospective business relations; and not to participate in a conspiracy to harm a member of the general public—legal duties owed to every member of society under Texas state law, not rights created by the CBA or the Regulations.[5]

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[3] *See* Defendants' Notice of Filing of Notice of Removal to the Northern District of Texas, Dallas Division ("Notice of Removal") (doc. 1).

[4] *See* Order (doc. 19).

Because Weinberg's Texas state law claims are based on duties owed to the general public and are not based on the CBA or the Regulations, they are not pre-empted by Section 301 of the LMRA, nor do they require or depend on substantial analysis, interpretation, or application of the CBA and the Regulations. The NFLPA Defendants' have speciously attempted to couch Weinberg's claims as a challenge to the NFLPA's exclusive bargaining power under Section 9 of the NLRA, but Weinberg does not challenge his decertification. Finally, the NFLPA Defendants' argument on complete diversity lacks merits because, as shown below, Weinberg has colorable claims (and thus a possibility of recovery) against John Collins and Keith Washington, who are residents of the State of Texas.

[5] *See* Prosser and Keeton, *Torts* § 92, at 655 (5th Ed. 1984) (tort obligations are "imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction).

IV.

ARGUMENT AND AUTHORITIES

A. Plaintiff's Claims Are Not Pre-empted By Section 301 Of The LMRA or By Section 9 Of The NRLA.

Any discussion of whether Plaintiffs' claims are preempted under Section 301[6] of the NRLA must begin with a United States Supreme Court decision that the NFLPA briefly cites to in its Motion to Remand: *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). The plaintiffs in *Caterpillar* had been hired for positions covered by a collective bargaining agreement but later left the bargaining unit for management and other positions outside the bargaining unit. *Id.* at 388. After they left the bargaining unit, Caterpillar allegedly made statements to the plaintiffs guaranteeing their employment. *Id.* at 388-89. When Caterpillar later laid off the plaintiffs, they sued claiming a breach of their individual employment contracts. *Id.* at 389-90.

The Supreme Court held that "a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." *Id.* at 396. The Court further held that the complaint was not "substantially dependent upon interpretation of the collective-bargaining agreement. It does not rely on the collective bargaining agreement indirectly, nor does it address the relationship between the individual contracts and the collective bargaining agreement." *Id.* at 395.

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[6]Section 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . .between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

The following year, the Supreme Court issued another major Section 301 preemption decision (not cited by Defendants) in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), this time a tort action. The Supreme Court held that Section 301 did not preempt a state law tort claim (even where a similar claim could have been brought under the collective bargaining agreement) because it could be resolved without interpretation of the collective bargaining agreement. *Id.* at 407. The issues raised were "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer." *Id.* It did not matter that a claim under the collective bargaining agreement would involve the same factual issues because the state law claim was "'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.*

Finally, in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), the Court held that it is the legal character of a claim, and not whether a grievance could be pursued, that decides whether a state cause of action may go forward. "[W]hen the meaning of [non-collectively bargained] contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Id.* at 124. The Court specifically notes that the preemption rule had only been applied to insure that the purposes animating section 301 would not be frustrated. *Id.* at 122-23.

B. Defendants Cannot Claim Preemption Based On A Defense that Relies On The CBA.

The Court in *Livadas* similarly described Defendants' argument here: "[T]hat a plaintiff's claim cannot be 'resolved' absent collective-bargaining agreement interpretation, i.e., that a term of the agreement may or does confer a defense on the employer (perhaps because the employee or his union has negotiated away the state-law right)." *Id.* at 124. The Court also indicated how such a claim should be dealt with: "there is no suggestion here that Livada's union sought or purported to bargain away her protections under [state law], a waiver that we have said would . . . have to be 'clear and unmistakable,' *see Lingle*, 486 U.S. at 409-10, n. 9, for a court even to consider whether it could be give effect. . . ." *Id.* at 125 (citations omitted).

Relying on the foregoing passages in *Livadas*, *Lingle*, and on *Caterpillar*, the Ninth Circuit in *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Circ. 2001) (*en banc*) addresses the NFLPA's argument in this case:

> If the plaintiff's claim cannot be resolved without interpreting the applicable CBA . . . it is preempted. Alternatively, if the claim may be litigated without reference to the rights and duties established in a CBA . . . it is not preempted . . . . The plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim. If the claim is plainly based on the state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense. . . .
>
> Moreover, alleging a hypothetical connection between the claim and the terms of the CBA is not enough to preempt the claim: adjudication of the claim must require interpretation of a provision of the CBA. A creative linkage between the subject matter of the claim and the wording of a CBA provision is insufficient; rather, the proffered interpretation argument must teach a reasonable level of credibility. . . .
>
> ***Where a party defends a state cause of action on the ground that the plaintiff's union has bargained away the state law right at issue, the CBA must include "clear and unmistakable" language waiving the covered employees' state right***

> ***"for a court even to consider whether it could be given effect."*** . . . Thus, a court may look to the CBA to determine whether it contains a clear and unmistakable waiver of state law rights without triggering § 301 preemption.

Id. at 691-692 (emphasis added, citations omitted).

The Ninth Circuit thereafter relied on this analysis to foreclose a claim of preemption in *Sprewell v. Golden State Warriors*, 266 F.3d 979, 991-2 (9th Cir. 2001), where Latrell Sprewell, a professional basketball player, sued his employer, the Golden State Warriors, asserting a variety of state law claims:

> ***Any attempt by the NBA and the Warriors to pull Sprewell's [state law] claims into the preemptive scope of section 301 by mounting a defense in reliance on the CBA would be fruitless.*** This conclusion is compelled by our recent en banc decision opinion in *Cramer*. . . . This conclusion would hold true even if the NBA and the Warriors were to allege that Sprewell's union bargained away his state law right to contest the veracity of the NBA's and the Warriors' statements to the media. We have previously held that "[w]here a party defends a state cause of action on the ground that the plaintiff's union has bargained away the state law right at issue, the CBA must include clear and unmistakable language waiving the covered employees' state right for a court even to consider whether it could be given effect.

(Emphasis added, internal citation omitted). *See also*, *Valles v. Ivy Hill Corporation*, 410 F.3d 1071, 1082, n. 12 (9th Cir. 2005); *Bluford v. Safeway Stores, Inc.*, Civil Action No. 02:06-cv-0523-GEB-PAN, 2006 WL 2131310 at *3 (E.D. Cal. July 28, 2006). Here, neither the CBA nor the Regulations take away Weinberg's right to assert intentional tort claims against the NFLPA Defendants.

Tort claims that are based on common law duties (*i.e.*, not duties created by a CBA) are generally not preempted. *See, e.g., Chuy v. Philadelphia Eagles Football Club*, 431 F. Supp. 254 (E.D. Pa. 1977) (football player's claim against team for vicarious liability on behalf of team doctor not preempted); *Hendy v. Losse*, 925 F.2d 1470 (9th Cir. 1991) (football player's claim for negligent hiring of team doctor not preempted); *Hanks v. General Motors Corp.*, 906 F.2d 341, 343-44 (8th Cir. 1990) (auto worker's claim for negligent hiring of co-worker not preempted); *Hayden v. Reicherd*, 957 F.2d 1506, 1509 (9th Cir. 1991) (battery claim not preempted); *Peterson v. BMI Refractories*, 132 F.3d 1405, 1413 (11th Cir. 1998) (intentional tort claims not preempted); *Lee v. Pfeifer*, 916 F. Supp. 501, 509 (D. Md. 1996) ("Lee's assault claim does not require interpretation of the collective bargaining agreement and therefore is not preempted by § 301 of the LMRA").

Consulting or reviewing a CBA to decide preemption is not the same as "interpretation" warranting preemption; "if it were the preemption doctrine under § 301 would swallow the rule that employees can assert non-negotiable state law rights that are independent of their collective bargaining agreement." *Foy v. Pratt & Whitney Group*, 127 F.3d 229, 234 (2d Cir. 1997), citing *Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401, 1409-10 (9th Cir. 1991). When the collective bargaining agreement is "merely a tangential consideration in the resolution of an otherwise independent state law action or where resort to its provisions is merely pro forma," such consultation does not trigger § 301 preemption. *Loewen Group Int'l Inc. v. Haberichter*, 65 F.3d 1417, 1422 (7th Cir. 1995).

Finally, and very importantly, the Supreme Court's decision in *Caterpillar* effectively foreclosed the score of Defendants' preemption argument. In claiming that Art. IV, § 12 requires interpretation and thus preemption, Defendants are making the same or similar argument that defendants in *Caterpillar* made. As the Supreme Court described the argument:

> Finally, Caterpillar argues that § 301 pre-empts a state-law claim even when the employer raises only a defense that requires a court to interpret or apply a collective bargaining agreement. Caterpillar asserts such a defense claiming that,

> in its collective-bargaining agreement, its unionized employees waived any pre-existing individual employment contract rights.

482 U.S. at 398.

> The Court dismissed this theory, in the context of the well-pleaded complaint rule: [T]he presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule–that the plaintiff is the master of the complaint, that a federal question must appear on the fact of the complaint, and that the plaintiff may, be eschewing claims based on federal law, choose to have the cause heard in state court.
>
> When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded a deferral claim, and removal is at the defendant's option. But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.

Id. at 398-399 (emphasis in original).

In determining whether a purported tort claim is merely a restatement of a claim for violation of a CBA, a court must determine if "the duty to the employee of which the tort is a violation is created by a collective-bargaining agreement and without existence independent of the agreement." *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 366-67 (citing *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 211 (1985)). If there is a free-standing state tort duty, the Supreme Court has repeatedly advised that "it would be inconsistent with congressional intent . . . to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Allis-Chalmers*, 741 U.S. at 211-12; *Hawaiian Airlines v. Norris*, 512 U.S. 264, 260 (1994); *Livadas v. Bradshaw*, 512 U.S. 107, 123-124 (1994). To be independent of the CBA, a tort claim must allege a violation of a duty "owed to every person in society," as opposed to a duty owed only to employees covered by the collective bargaining agreement. *Rawson*, 495 U.S. at 371.[7]

Thus, the duties asserted by Weinberg are duties owed to the general public, not creatures of contract or the CBA. *Kwiatkowski v. Bear Stearns & Co.*, 126 F.Supp.2d 672, 694 (S.D.N.Y. 2000) (citations omitted); *see* Prosser § 92 at 655 (tort obligations are "imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction"). And, as stated above, § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law. *Livadas*, 512 U.S. at 123. In addition, contractual commitments cannot ordinarily serve to shield a defendant from liability for injury caused by a breach of the duty of due care. *See* RESTATEMENT (SECOND) OF TORTS § 4c. Weinberg, thus, is invoking a free-standing state law tort duty on the NFLPA Defendants, not a duty that only exists because of the CBA or the NFLPA Regulations.

1. Intentional tort claims and breach of contract claims are frequently not pre-empted under § 301.

In *Berda v. CBS, Inc.*, 881 F.2d 20 (3rd Cir. 1989), the plaintiff made a claim for negligent misrepresentation. After examining the elements of the tort under Pennsylvania law, the court concluded "[w]hen we consider these elements, it becomes clear that Berda was not required to refer to the collective bargaining agreement in order to state his tort claim." *Id.* at 27. The court specifically rejected the same argument Defendants have made here:

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[7]In *Rawson*, the Court found the tort claim of negligent inspection not independent of the CBA, as it was not "an act that could be unreasonable irrespective of who committed it and could foreseeably cause injury to any person who might possibly be in the vicinity." *Id.* at 371, 110 S.Ct. 1904. Rather, the claim arose only because the union, which would otherwise have had not duty to inspect the mines, undertook such a duty under the CBA.

> [T]hat the misrepresentations concerned layoffs and that there was a provision of the collective bargaining agreement that also related to layoffs are the facts of no consequence, because Berda need not refer to the provision in the collective bargaining.
>
> Agreement in order to make out his claim. Despite CBS's intimations to the contrary, Berda need not establish that the oral promise made to him prior to his employment differed from the terms of the collective bargaining agreement in order to get relief.

Id.

Negligent misrepresentation claims were also found not preempted in *Anderson v. Ford Motor Co.*, 803 F.2d 953, 958-59 (8^{th} Cir. 1986) ("Our analysis. . . satisfies us that these claims arise in state common law and are measured by standards of conduct and responsibility completely separate from and independent of a collective bargaining agreement"); *see also Foy*, 127 F.3d at 233-35. The *Foy* court carefully examined the defendant's claim that preemption was based on the need to examine the collective bargaining agreement to determine whether plaintiffs justifiably relied on the defendant's misrepresentations. *Id.* The court framed the issue as one of whether the plaintiffs' limited rights under the CBA might bear upon whether they could reasonable expect the defendants to make the undertaking alleged in the complaint, but rejected the defendant's argument as proving too much:

> [A] collective bargaining agreement can always be consulted to determine whether an employee is justified in relying upon an employer's promise. The argument comes down to the idea that an employee is never justified in relying upon any promise by the employer that is not enforceable under the CBA. If that were so, the existence of a CBA would require pre-emption in all cases involving representations made to employees.

Id. at 234. The court further examined another negligent misrepresentation claim:

> [P]laintiffs' negligent misrepresentation claims (and, for that matter, their other state law claims) are based on a promise that went beyond the terms of the CBA. . . . Of course one might consult this provision in determining whether plaintiffs' justifiably relied on that alleged unqualified promise, but reasonable reliance is primarily a fact question as to (1) what the plaintiffs believed, and (2) the circumstances surrounding the misrepresentation made by the employer. In this case, what matters is not so much the accurate construing of the CBA, but plaintiffs' understanding of its provisions, and the basis of that understanding. . . . These plaintiffs' state law misrepresentation claims depend upon the employer's behavior, modification, and statements, as well as plaintiffs' conduct, their understanding of the alleged offer made to them, and their reliance on it.

Id. at 235.

Contractual claims are also frequently upheld against Section 301 preemption. *Dollear v. G. F. Connelly Mech. Contractors, Inc.*, 355 F. Supp. 2d 937 (N.D. Ill. 2005) (promissory estoppel and breach of contract—retiree); *White v. National Steel Corp.*, 938 F.2d 474, 483-484 (4th Cir. 1991) ("plaintiffs are not relying on duties or promises contained in any collective bargaining agreement"; "Plaintiffs were not in positions covered by a collective agreement," relying on *Caterpillar*); *Hernandez v. Conriv Realty Assocs.*, 116 F.3d 35, 39 (2d Cir. 1997) ("These claims are state law breach of contract claims, and there appears to be no need for a court even to refer to a collective bargaining agreement to adjudicate these claims," relying in *Caterpillar*); *Branson v. Greyhound Lines, Inc. Amalgamated Council Retirement and Disability Plan*, 126 F.3d 747, 753-54 (5th Cir. 1997) (relying on *Caterpillar*); *Loewen Group Int'l v. Haberichter*, 65 F.3d at 1422 (in order to prove claims plaintiff needed to prove existence of contract, performance by the plaintiff, breach by defendant, and damages; "[o]nly a quick glance at these elements is needed to find that no resort to the collective bargaining agreement is required here in order to resolve the claims asserted. Rather, these elements merely require an inquiry into the behavior of the parties.").

In *Salgadoe v. San Francisco Hilton*, Civil Action No. C-93-0221-SBA, 1993 WL 112448 at *3 (N.D. Ca. March 26, 1993), the plaintiff asserted a claim for breach of an individual implied contract of employment. Defendant argued that the state action was preempted because it could not be decided without interpreting a clause in the CBA prohibiting individual contracts. The district court held that this clause did not make the breach of contract claim "substantially dependant on the CBA." It relied on *Caterpillar*: "Most importantly, the Supreme Court stated that a plaintiff covered by a CBA is permitted to assert legal rights independent of that agreement, so long as the contract relied upon is not the CBA. . . . In the instant case, plaintiff's claim is only tangentially related to the CBA, if at all." *Id.* at *3. Because, under California law, an implied contract might arise from a combination of factors:

> The court would not need to examine the CBA to determine if a promise was made to the plaintiff. However, even if the state court would need to review the provision of the CBA cited by defendant in order to determine if the promise had any legal force, that does not convert plaintiff's action into a dispute which is directly founded upon the CBA or substantially dependent upon the CBA as required for preemption under section 301.

Id. Under the same analysis, Weinberg's state claims cannot be preempted because the elements of Weinberg's state claims merely require an inquiry into the behavior and motive of the NFLPA Defendants.

2. A review of the elements of Plaintiff's claims shows that pre-emption does not apply.

The proper way to determine whether state law claims are substantially dependent on the collective bargaining agreement is to begin by examining the elements of the state law claims.

See Lingle, 486 U.S. at 407; *Foy*, 127 F.3d at 233. In this action, Plaintiffs allege four substantive state law claims: fraud, tortious interference with existing contracts, tortious interference with prospective business relations and conspiracy. Similarly, issues of damages do not require such an interpretation. *Livadas*, 512 U.S. at 125.

The elements of Weinberg's fraud claim are: (1) the NLFPA Defendants made representation(s) to Weinberg; (2) the representation(s) were material; (3) the representation(s) were false; (4) when the NFLPA Defendants made the representation(s), the NFLPA Defendants (I) knew the representation(s) were false or (ii) made the representation(s) recklessly and without knowledge of their truth; (5) the NFLPA Defendants made the representation(s) with the intent that Weinberg act on it; (6) Weinberg relied on the representation(s); and (7) the representation(s) caused Weinberg injury. *See Ernst & Young v. Pacif. Mut. Life Ins. Co.*, 515 S.W.3d 573, 577 (Tex. 2001).

The elements of Weinberg's tortious interference with an existing contracts are the following: (1) Weinberg has a valid contract or contracts with NFL players; (2) the NFLPA Defendants willfully and intentionally interfered with those contract(s); (3) the interference was a proximate cause of Weinberg's injury; and (4) Weinberg incurred actual damages or loss. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207 (Tex. 2002).

The elements of an action for tortious interference with prospective business relations are the following: (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third person; (2) the defendant intentionally interfered with the relationship; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference was the proximate cause of the plaintiff's injury; and (5) the plaintiff suffered actual damage or loss. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001).

The statutory claim for illegal restraint of trade requires a showing that the defendants engaged in a conspiracy that restrained trade in Texas. *See* TEX. BUS. & COMM. CODE § 15.05. The elements of Weinberg's conspiracy claim are the following: (1) the defendant was a member of a combination of two or more persons; (2) the object of the combination was to accomplish (i) an unlawful purpose, or (ii) a lawful purpose by unlawful means; (3) the members had a meeting of the minds on the object or course of action; (4) one of the members committed an unlawful, overt act to further the object or course of action; and (5) the plaintiff suffered injury as a proximate result of the wrongful act. *See J.T.T. v. Chan Tri*, 162 S.W.3d 552, 556 (Tex. 2005).

As stated *infra*, various federal courts of appeals have repeatedly found no Section 301 preemption. Further, courts have held that factual questions of employer conduct and motives do not require an interpretation of a collective bargaining agreement. *See Foy*, 127 F.3d at 235 (citing *Hawaiian Airlines*, 512 U.S. at 260-62). Likewise, issues of damages do not require such an interpretation. *Livadas*, 512 U.S. at 125.

In this action, Weinberg has alleged, *inter alia*, that the NFLPA Defendants used lies, deceit and/or misrepresentations in a conspiracy with the intent of tortiously interfering with Weinberg's existing and prospective business relations that ultimately destroyed Weinberg's life's work and passion. For purposes of this motion, the NFLPA Defendants cannot dispute the facts in Weinberg's First Amended Petition.

The NFLPA Defendants, however, view (albeit incorrectly) Weinberg's state law claims through a different lens, claiming that this case is really a dispute over the terms of the CBA between the NFLPA—the player's union—and the teams comprising the NFL; thus, they argue that Section 301 of the LMRA, 29 U.S.C. § 185(a) completely preempts Weinberg's state law claims. The NFLPA Defendants also argue that Weinberg's state law claims are completely preempted under Section 9 of the NLRA because they allegedly arise out of Weinberg's decertification and constitute a direct attack on the NFLPA's authority under Section 9(a) of the NLRA to decertify Weinberg.

To begin, Weinberg wants to make it crystal clear that he is not disputing or challenging the well-established law that if the plaintiff's claim cannot be resolved without interpreting the applicable CBA, it is pre-empted under Section 301 of the LMRA. *See Livadas*, 512 U.S. at 123; *Lingle*, 486 U.S. at 406; *Caterpillar*, 482 U.S. at 394-5. Likewise, with his state law claims, Weinberg is by no means is attempting to challenge the NFLPA Defendants' right to enter into an exclusive bargaining agreement with the NFL teams under Section 9 of the NLRA.

In support of their Notice of Removal, the NFLPA Defendants make sweeping claims that Weinberg's state claims are completely pre-empted by Section 301 of the LMRA because they allegedly will require "substantial analysis" of the CBA citing to the fact that CBA prohibits NFL employer clubs from negotiating with agents other than those certified by the NFLPA under the Regulations and citing to the fact that the CBA confirms that agents can be suspended immediately in "extraordinary circumstances" as allegedly occurred with Weinberg.

Defendants' arguments miss the mark: Weinberg's state law claims are not inextricably intertwined with the terms of the CBA, and the application of Texas state law to this dispute will not require interpretation of the CBA. Weinberg does not challenge what the NFL teams, the NFL players and/or agents agreed to do or do not under the CBA or the Regulations. Rather, Weinberg is asserting his right under Texas state law not to have the NFLPA Defendants tortiously interfere with existing contracts or with prospective business relations and not for the NFLPA Defendants to enter into a conspiracy whose unlawful intent was to destroy Weinberg's life work and passion.

Weinberg did not give up his civil law right to bring claims against the NFLPA Defendants imply by virtue of becoming a Contract Advisor and the NFLPA Defendants did not have the legal right under any part of the CBA, Section 301 of the LMRA or Section 9 of the NLRA to defraud Weinberg, unlawfully conspire against Weinberg, and to unlawfully tortiously interfere with Weinberg's existing contracts or with Weinberg's prospective business relations.

C. This Court Does Not Have Jurisdiction Over 28 U.S.C. § 1332(a).

28 U.S.C. § 1332(a) provides that this Court shall have jurisdiction over all actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states.[8] Defendants must prove that complete diversity of citizenship existed between all defendants and all plaintiffs as of the date the suit was commenced and the date of its removal to federal court.[9]

In the Notice of Removal, the NFLPA Defendants concede that complete diversity does not exist between Weinberg and all defendants.[10] Because complete diversity does not exist between each plaintiff and defendant (Plaintiff Weinberg is a Texas resident, as are Defendants

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[8]28 U.S.C. § 1332(a)(2).

[9]*See OJB, Inc. v. Dowell, a Div. of Dow Chemical Co.*, 650 F. Supp. 42, 43-44 (N.D. Tex. 1986) (for purposes of removal, diversity of citizenship must exist at the time of filing of the original action and at the time of removal); First Amended Original Petition at ¶¶ 1-3.

[10]*See* Notice of Removal (doc. 1) at 7-8.

John Collins and Keith Washington) and because Weinberg has colorable claims against Collins and Weinberg, this Court lacks diversity jurisdiction and should remand this case to the State Court.[11]

D. The NFLPA Defendants Cannot Meet The Heavy Burden Required To Demonstrate Improper Joinder.

To justify removal, the NFLPA Defendants must show that Defendants Collins and Washington were "fraudulently" or "improperly joined" as defendants to defeat diversity jurisdiction.[12] The NFLPA cannot satisfy this heavy burden.[13] As demonstrated below, Collins and Washington are proper defendants.

1. The burden and applicable standard.

A defendant alleging "fraudulent joinder" or "improper joinder" bears a heavy burden.[14] To prove fraudulent joinder, the removing party must clearly establish: (1) there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or (2) there has been outright fraud in plaintiff's pleading of jurisdictional facts.[15] When ruling on a defendant's assertion of fraudulent or improper joinder, the Court must evaluate all of the factual allegations of the complaint in the light most favorable to plaintiff, resolve all contested issues of fact in favor of plaintiff, and "then examine relevant state law and resolve all uncertainties in favor of the non-removing party."[16] The relevant inquiry is whether the plaintiff "has any possibility of recovery" against the party whose joinder is questioned.[17] The NFLPA Defendants must establish fraudulent joinder through clear and convincing evidence.[18] The NFLPA cannot satisfy these stringent requirements.[19] Therefore, Weinberg's motion to remand should be granted.

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[11]*See Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995) (recognizing that removing party must set forth facts justifying removal); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981) ("[W]e have consistently held that it is the party who urges jurisdiction upon the court who must always bear the burden of demonstrating that the case is one which is properly before the federal tribunal."); *see also Lincoln Assoc., Inc.*, 415 F. Supp. at 353 n.3 (same).

[12]*See* Notice of Removal.

[13]*See Cavallini v. State Farm Auto. Inc. Co.*, 44 F.3d 256, 259 (5th Cir. 1995) (stating that burden of proving fraudulent joinder is a heavy one).

[14]*See Cavallini*, 44 F.3d at 259 ("The burden of proving fraudulent jooinder is a heavy one . . ."); *Ford v. Elsbury*, 32 F.2d 931, 935 (5th Cir. 1994) (citing *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40 (5th Cir. 1992) (stating that removing party must demonstrate that there is no possibility plaintiff will be able to establish a cause of action). *See also B., Inc.*, 663 F.2d at 549 ("The burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one.").

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[15]*See Cavallini*, 44 F.3d at 29 (citing *Green v. Amerada Hess*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984)).

[16]*See Cavallini*, 44 F.3d at 259; *Ford*, 32 F.3d at 935 (same); *see also B., Inc.*, 663 F.2d at 549 (same).

[17]*See Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1064) (fraudulent joinder must be established by clear and convincing evidence). *See also Bankard v. Wyeth-Ayerst Labs. Co.*, 898 F. Supp. 426, 428 (E.D. Tex. 1995) (same).

[18]*See LeJeune v. Shell Oil Co.*, 950 F.2d 260, 267 (5th Cir. 1992). *See also McCabe v. Henpil, Inc.*, 889 F. Supp. 983, 990 (E.D. Tex. 1995) (same).

[19]*Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990) ("After all disputed questions of fact and all ambiguities in the controlling state law are resolved in favor of the nonmoving party, the court determines whether that party has any possibility of recovery against the party whose joinder is questioned."), *cert. denied*, 498 U.S. 817 (1990); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 216 (5th Cir. 1995) ("If the plaintiff has nay possibility of recovery under state law against the party whose joinder is questioned, then the joinder is not fraudulent in fact or law. We do not determine whether the plaintiff will actually or even probably prevail on the merits of the claim, but look only for a possibility that the plaintiff might do so.").

2. The NFLPA does not alleged "outright fraud" in the pleading of jurisdictional facts.

The NFLPA Defendants do not claim there was any "fraud" in the pleading of jurisdiction facts.[20] Instead, they contend that there is no possibility that Weinberg can recover against Collins or Washington.[21]

3. The NFLPA Defendants cannot demonstrate there is absolutely no possibility that Weinberg will be able to establish a cause of action against Collins.

In this action, Weinberg alleges *inter alia* that Collins and Washington were part of a conspiracy to defraud Weinberg, tortious interference with his existing contract, tortious interference with his prospective business relations, and to improperly restrain trade in Texas. All of the elements for those claims are properly set forth in the First Amended Petition and must be accepted as true for purposes of analyzing whether Collins and/or Washington were improperly joined as defendants to defeat complete diversity.[22]

More specifically, Weinberg has alleged *inter alia* that Collins twice participated in the NFLPA Defendants' unlawful conspiracy by (1) giving false testimony in Weinberg's appeal of his three (3) year decertification and (2) drafting and implementing an escrow fund that wrongfully withheld agent fees rightfully earned by Weinberg.[23] The Petition alleges that Collins lied and/or made reckless false statements about whether Weinberg had violated the Texas

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[20] *See* Notice of Remand at ¶¶ 29-34.

[21] *See id.*

[22] *See* Petition (doc. 1-5), Count Two (Conspiracy to Commit Fraud) at ¶¶ 101-108; Count Four (Conspiracy to Tortiously Interfere with Existing Contracts) at ¶¶ 114-121; and Count Six (Conspiracy to Tortiously Interfere with Prospective Business Relations) at ¶¶ 127-134.

[23] *See id.* at ¶ 83.

Fraudulent Transfer Act by transferring certain assets to avoid paying a lawful judgment to his former partner. Weinberg alleges that these statements were false because (i) he received cash at or near market value on all asset transfers and (ii) the judgment he is alleged to have tried to defeat was declared "unenforceable" and "void for vagueness."[24]

The NFLPA Defendants argue that "in the absence of a statute to the contrary, an unsuccessful litigant who has lost his case because of perjured testimony, cannot maintain a civil action against the person who commits the perjury."[25] However, Weinberg is not suing Collins for perjuring himself but rather for his part in the conspiracy to defraud Weinberg and tortiously interfere with his existing contracts, among other things.

Furthermore, Collins participated in the conspiracy by tortiously interfering with existing contracts by wrongfully failing to return funds in an escrow account that Weinberg had rightfully earned. Acting on instructions from Berthelsen, Collins opted to pay the money instead to Weinberg's former partner, resulting in an injury to Weinberg in Texas.[26]

Although the NFLPA Defendants argue that "a lawyer's professional duty . . . does not extend to whom the lawyer did not represent,"[27] they miss the mark regarding the nature of Weinberg's claims: he is not asserting any type of legal malpractice claim against Collins. Rather, he is asserting *inter alia* that Collins along with other co-conspirators knew that

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[24]*See* Petition (doc. 1-5 ¶ 82).

[25]*See* Defendants' Notice of Remand at ¶ 32, citing to *Kale v. Palmer*, 791 S.W.2d 628, 632 (Tex. App. 1990).

[26]*Id.*

[27]*See* Notice of Removal at ¶ 33 (citations omitted).

Weinberg had existing contracts with NFL players and wrongfully interfered with those contracts by refusing to pay Weinberg funds in an escrow account for his benefit.

If the defendants' argument held here, Collins would essentially be immune from any tort claim by any third party who was not his client—clearly not the law because the validity of a tort claim does not turn on whether the tort-feasor was an attorney. Because Weinberg has colorable tort claims against Collins, diversity jurisdiction does not exist.

4. The NFLPA Defendants cannot demonstrate there is absolutely no possibility that Weinberg will be able to establish a cause of action against Washington.

The Petition alleges *inter alia* that Keith Washington participated in Defendants' conspiracy to defraud Weinberg and to take him out of the marketplace by submitting a letter to the NLFPA Disciplinary Committee (which Weinberg believes was drafted by one or more top executives of the NFLPA) containing false information regarding Washington's early payment of agent fees to Weinberg.[28] Upon information and belief, the NFLPA crafted the false information contained in the Washington letter and then wrongfully convinced the NFLPA Disciplinary Committee to rely upon it as the basis for revoking Weinberg's license to act as a Certified Contract Advisor on February 6, 2003.

In the improper joinder argument, the NFLPA Defendants argue that Weinberg's claims against Washington do not give rise to a legally viable cause of action on the grounds that there is allegedly no Texas state law cause of action based on allegations that a defendant willfully and intentionally provided false evidence in a court proceeding.[29] But Weinberg is not suing

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[28]*See* Petition (doc. 1-5) ¶¶ 66-72.

[29]*See* Notice of Removal ¶ 31 (citing to *Morris v. Nowotny*, 398 S.W.2d 661, 662 (Tex. App. 1966)).

Washington just for giving false testimony, he is also suing for Washington's participation in a bigger conspiracy to ruin his life though unlawful means, including lying to Weinberg and intentionally interfering with his right to receive payments under existing contracts. Thus, because Weinberg has colorable claims against Washington, diversity jurisdiction does not exist.

E. Collins and Washington Have Conspired To Defraud Weinberg and Tortiously Interfered with Weinberg's Existing Contracts and Prospective Business Relations.

Based on the "well-pleaded complaint rule," Weinberg has alleged sufficient facts indicating that there is a justiciable controversy among the parties necessitating judicial intervention.[30] The NFLPA, therefore, has failed to meet its burden of demonstrating that Weinberg has "absolutely no possibility" of prevailing against Collins or Washington.[31] Accordingly, the Court should remand this action to state court because the Court does not have diversity jurisdiction over this action.

F. The NFLPA Defendants Should Be Required To Pay Weinberg's Reasonable Attorneys' Fees And Costs Incurred In Filing This Motion To Remand.

Pursuant to 28 U.S.C. § 1447, this Court is expressly authorized to award Weinberg reasonable attorneys' fees and costs incurred in filing this Motion.[32] Such an award is appropriate in this case because the NFLPA Defendants have filed a meritless notice of removal.[33] Specifically, the NFLPA was on notice that Collins and Washington were parties to this action since the time Weinberg filed his Original Petition and, hence, that they were not fraudulently or improperly joined. As a result, this Court should not only remand the case to state court, but should also award Weinberg reasonably attorneys' fees and costs.

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[30]*See id.*

[31]*See Cavallini*, 44 F.3d at 29.

[32]*See* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.").

[33]*Miranti v. Lee*, 3 F.3d 925, 928-29 (5th Cir. 1993).

V.

CONCLUSION

Wherefore, premises considered, Plaintiff Weinberg respectfully requests that the Court grant this motion to remand, award him attorneys' fees, and grant him all other relief the Court deems just and appropriate in equity or at law.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

On January 31, 2007, counsel for movant conferred with counsel for respondent who was opposed to the relief sought herein.

/s/ S. Wallace Dunwoody IV
S. Wallace Dunwoody IV

CERTIFICATE OF SERVICE

On January 31, 2007, I electronically transmitted the foregoing Plaintiff's Motion to Remand and Brief in Support Therefor using the ECF System for filing a Notice of Electronic Filing to those parties registered for ECF in this case. I further certify that the foregoing document was served on all counsel of record by ECF.

/s/ S. Wallace Dunwoody IV
S. Wallace Dunwoody IV

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